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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

November 27, 2000

Via HAND DELIVERY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
The Portals -- Room TW-A325  
445 Twelfth Street, SW  
Washington, DC 20554

**Re: In the Matter of Inquiry Concerning High-Speed Access to the Internet Over  
Cable and Other Facilities, GN Docket No. 00-185**

Dear Ms. Salas:

On behalf of EchoStar Satellite Corporation ("EchoStar"), enclosed please find for filing an original and four (4) copies of EchoStar's Comments in the above-referenced matter.

Also enclosed is an additional copy of EchoStar's Comments, which we ask you to date-stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Rhonda Rivens Bolton  
Counsel for EchoStar  
Satellite Corporation

Enclosures

No. of Copies rec'd 0+4  
List A B C D E

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of )  
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Inquiry Concerning High-Speed Access )  
to the Internet Over Cable and Other )  
Facilities )  
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GN Docket No. 00-185

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

**COMMENTS OF ECHOSTAR SATELLITE CORPORATION**

EchoStar Satellite Corporation (“EchoStar”) hereby submits its Comments in response to the above-captioned Notice of Inquiry released by the Commission on September 28, 2000.<sup>1</sup> The Notice requests comments regarding what regulatory treatment, if any, should be accorded to high-speed access to the Internet provided to subscribers over cable infrastructure, which the Commission refers to as “cable modem services.” EchoStar is a Direct Broadcast Satellite (“DBS”) distributor that currently competes against cable providers in the market for multichannel video programming distribution (“MVPD”) services.

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<sup>1</sup> *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185 (rel. Sept. 28, 2000) (“Notice” or “NOP”).

## **I. INTRODUCTION AND SUMMARY**

A potentially suitable analytical framework for deciding whether to impose open access obligations is offered by the essential facilities doctrine of the antitrust laws.<sup>2</sup> Under that standard it appears that cable operators should likely be subject to open access requirements, so long as constitutional concerns are also allayed. Not only has the Commission repeatedly found cable systems to possess market power, but they also appear to satisfy the other components of the doctrine: control over a bottleneck facility, competitors' inability practically or reasonably to duplicate the bottleneck facility, denial of the use of the facility to a competitor, and feasibility of accommodating use of that facility by other providers.<sup>3</sup> Under the same standard, it would currently be impossible to justify subjecting distributors such as EchoStar to open access requirements. Finally, should the Commission decide to impose open access requirements on cable operators, open access should not be available only to content providers, but also to "horizontal" competitors to cable that lack market power such as EchoStar. EchoStar needs such access to compete on a more even footing with the video/broadband bundles increasingly being offered by cable operators.

## **II. MARKET POWER SHOULD BE THE STARTING POINT FOR DETERMINING WHETHER TO MANDATE OPEN ACCESS TO A CABLE MODEM PLATFORM**

The Commission stated in the NOI that it seeks "to determine the conditions under which the Commission should mandate open access to the cable modem platform."<sup>4</sup> In

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<sup>2</sup> See, e.g., *MCI Communications, Inc. v. AT&T*, 708 F.2d 1081 (7<sup>th</sup> Cir.), cert. denied, 464 U.S. 891 (1983).

<sup>3</sup> *MCI*, 708 F.2d at 1132-33.

<sup>4</sup> Notice at ¶ 41.

developing these conditions, the Commission should consider borrowing the analytical framework of the antitrust “essential facilities” doctrine.<sup>5</sup> Market power is of course the starting point under such an analysis.

It is well established that incumbent cable operators have market power in the MVPD market. In fact, the Commission has already made this determination – repeatedly. Every year the Commission conducts an assessment of competition in the MVPD markets, and has concluded every year that cable operators possess market power. As the Commission recently noted, “[t]he market for delivery of video programming to households continues to be highly concentrated and characterized by substantial barriers to entry.”<sup>6</sup> The statistics are telling: the Commission has observed that approximately 97% of the nearly 100 million U.S. television households were passed by cable by the end of June 1999,<sup>7</sup> and cable operators serve 67% of those households.<sup>8</sup> Not surprisingly, cable operators continue to command the preponderance of MVPD subscribers, claiming 82% of the MVPD market through June 1999.<sup>9</sup> This market power

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<sup>5</sup> The court in *MCI* laid out the framework: “The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; the denial of the use of the facility to a competitor; (4) the feasibility of providing the facility.” 708 F.2d at 1132-33.

<sup>6</sup> *In the Matter of Annual Assessment of Competition in the Markets for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd. 978, ¶ 140 (2000) (“1999 Competition Report”).

<sup>7</sup> *Id.* at ¶ 19 (citation omitted).

<sup>8</sup> *Id.* at ¶ 20.

<sup>9</sup> *Id.* at ¶ 5. The Supreme Court has held that “[t]he existence of [monopoly] power ordinarily may be inferred from the predominant share of the market.” *United States v. Grinnell Corp. et al.*, 384 U.S. 563 (1966) (citing *United States v. du Pont & Co.*, 351 U.S. 377, 391 (1956)). While the cable industry’s market share has slipped marginally (approximately 1%), this decline is not nearly enough to demonstrate a loss of market power. *See, e.g., Walter L.*

(Continued ...)

is evident not only from the predominant share of MVPD subscribers served by cable operators, but also from the continuing cable rate increases<sup>10</sup> and cable operators' ability to wield excessive influence over the programming market.<sup>11</sup>

Since the passage of the 1992 Cable Act, Congress and the Commission have expressed concern regarding the intractable problem of cable's domination and have sought to loosen cable operators' grip and promote effective competition in the market. Yet, cable's dominance may be augmented and cemented through the aggressive roll-out of high-speed, broadband capability and services by large cable MSOs. For example, AT&T has announced a goal of signing up 500,000 cable-telephony subscribers by the end of this year and plans to cross-subsidize its broadband services from its massive pool of long distance revenues.<sup>12</sup>

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*Reazin, M.D. et al. v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951, 970 (10<sup>th</sup> Cir. 1990) ("A declining market share . . . does not foreclose a finding of market power.") (quoting *Oahu Gas Serv. v. Pacific Resources, Inc.*, 838 F.2d 360, 366-67 (9<sup>th</sup> Cir. 1988)).

<sup>10</sup> See, e.g., "Hyde Rips Cable Rate Hikes," *Chicago Sun-Times* (July 21, 2000); "Key Legislator Pushing for Review of Cable Rates," *The Atlanta Journal and Constitution* (July 20, 2000); "37 Cities Face Cable Hikes," *The Dallas Morning News* (May 13, 2000).

<sup>11</sup> In many instances, cable operators have been able to extract anti-competitive terms and conditions from both affiliated *and unaffiliated* programmers, which is borne out in the Commission's recent conclusion that "[n]oncable MVPDs . . . continue to experience some difficulties in obtaining programming from both vertically integrated cable programmers and unaffiliated programmers who continue to make exclusive arrangements with cable operators." *Commission Adopts Sixth Annual Report on Competition in Video Markets*, News Release, CS Docket No. 99-230 (rel. Jan. 14, 2000). And in its 1999 Competition Report, the Commission noted the prevalence of "clustering" as reflected by the announcement of several significant transactions, including the AT&T-Media One, Adelphia-Century, and Comcast-Jones Intercable mergers, that would result in even larger cable MSOs with even greater buying power in the programming market. *1999 Competition Report* at ¶ 166.

<sup>12</sup> Farrell, Mike, "AT&T Delights by Wrapping Up Excite," *MultiChannel News* (Sept. 4, 2000) ("AT&T has been scrambling to meet its year-end goal of 500,000 cable-telephony customers . . . and expected to start a special promotion in several large cities . . . offering up to five free months of local and long-distance telephone service.").

These initiatives of AT&T and other cable operators threaten to compound significantly the cable dominance already observed by the Commission. EchoStar is particularly disadvantaged by this development, first because the current one-way DBS satellite distribution platform simply cannot compete against a bundle of video, two-way broadband and telephone offered by companies such as AT&T, and second, because radio spectrum limitations mean that satellite operators cannot begin to try to match the type of bandwidth that fiber optic can provide. While EchoStar has embarked upon a very ambitious plan to compete with the likes of AT&T in providing broadband service, EchoStar's current offering, through its participation in the StarBand venture with Gilat, is relatively cumbersome for consumers because it requires an additional and relatively large dish. EchoStar's next-generation broadband plans – involving use of the Ka-band – are also seriously bandwidth-limited.

In short, not only do cable operators still have market power, but that power threatens to be compounded at the expense of distributors such as EchoStar by virtue of increasing deployment by cable operators of the high-speed Internet access services that are the subject of this proceeding. The conditions to be developed by the Commission in this proceeding should be designed to cure the huge competitive disparity suffered by distributors such as EchoStar.

### **III. CABLE OPERATORS ALSO APPEAR TO MEET THE OTHER COMPONENTS OF THE ESSENTIAL FACILITIES STANDARD**

Before imposing open access requirements, the Commission should also consider whether the cable platform in question has bottleneck control over broadband delivery to consumers, can be reasonably duplicated and can feasibly accommodate other providers.<sup>13</sup>

Significantly, consideration of the bottleneck control factor is consistent not only with the antitrust essential facilities doctrine, but also with Commission precedent regarding open access. The Commission has already recognized the dangers posed by bottleneck control of the telephone platform, and held that all incumbent local exchange carriers are required to provide access to any high-speed networks that they implement. In doing so, the Commission stated:

We agree . . . that, if we are to promote the deployment of advanced telecommunications capability to all Americans, competitive LECs must be able to obtain access to incumbent LEC XDSL-capable loops on an unbundled and nondiscriminatory basis.<sup>14</sup>

In addition to possessing significant market power, cable operators would appear in most cases to control the exclusive pipe for providing truly broadband services to the home. To grasp the extent of this bottleneck control over broadband delivery, it is useful to compare the bandwidth offered by different delivery platforms.<sup>15</sup> In contrast with the finite bandwidth

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<sup>13</sup> *MCI*, 708 F.2d at 1132-33.

<sup>14</sup> *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Notice of Inquiry, CC Docket No. 98-146, ¶ 39 (rel. Aug. 7, 1998).

<sup>15</sup> As the Commission suggested in the NOI, there are technical differences among platforms that the Commission should consider. *See Notice* at ¶ 46.

available to wireless and satellite systems, the terrestrial broadband pipe technologies available to cable systems offer bandwidth that is virtually limitless for almost all current practical purposes. Duplication of this pipe requires an investment of tens of billions of dollars, and would therefore be impractical – another component of the “essential facilities” analysis. Finally, the abundance of the bandwidth offered by the terrestrial cable systems alone means that cable operators would likely be able to accommodate other providers and that open access requirements would not be at the expense of a cable system’s current subscribers.

In short, application of the essential facilities standard would appear to militate in favor of subjecting cable modem platforms to open access requirements. By the same token, it would be inappropriate to apply mechanically any open access requirement to other high-speed access platforms. EchoStar, for one, certainly does not satisfy any of the components of the essential facilities standard or any other plausible competitive analysis.

While EchoStar does not currently take a position on the constitutional concerns arising in connection with open access requirements for cable systems, a determination that a cable system satisfies all the components of the essential facilities standard may go a long way towards allaying such concerns. When upholding the constitutionality of must-carry rules for cable operators, the Supreme Court relied both on the bottleneck control that cable operators possess, and on a finding that those requirements did not impose an undue burden on cable operators.<sup>16</sup> Both of these tests are related to the “bottleneck control” and “feasibility” parts of the essential facilities standard.<sup>17</sup>

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<sup>16</sup> See *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”) and *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994). EchoStar’s reference to the *Turner* cases is strictly for the purpose of explicating the types of considerations that should be weighed,  
(Continued ...)



#### **IV. OPEN ACCESS TO CABLE PLATFORMS SHOULD ALSO BE MADE AVAILABLE TO COMPETING DISTRIBUTORS SUCH AS ECHOSTAR**

Should the Commission decide to impose open access requirements on cable operators, open access should not be available only to content providers. The competitive disadvantage faced by cable's MVPD competitors is similar to, but actually more acute than, the disadvantage confronting Internet Service Providers ("ISP"s). As the ISPs have argued in several proceedings before the Commission, there is a significant risk that cable operators will combine their unrivalled broadband access capabilities with their own Internet content, to the exclusion of alternative content sources. In the case of EchoStar, however, the risk is in one sense even more serious, as cable operators already distribute their own highly-developed video content (their programming packages) to a subscriber base of many millions of households, compared to their significantly more limited penetration of the market for Internet content. Unlike the market for Internet content – where AT&T, for example, is in one sense the “upstart” market entrant, albeit a formidable one – AT&T already dominates the MVPD market. Consumers in the MVPD marketplace increasingly demand interactive services as an indispensable part of any MVPD offering. Thus, AT&T's ability to significantly foreclose competition from other MVPD providers is as simple as offering integrated service packages over the nationwide broadband capacity that it exclusively controls.

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and is not for the purpose of addressing the level of scrutiny (i.e., strict vs. intermediate) warranted by the must carry rules or any other mandated carriage regime.

<sup>17</sup> On the other hand, neither the bottleneck characteristic nor the finding of no inordinate burden applies to a distributor such as EchoStar, which, among other things, lacks market power and has access to very limited bandwidth.

DBS companies are technologically disadvantaged in offering truly interactive products. DBS services (which use the DBS downlink spectrum) do not have a return link from the home to the satellite and cannot at this point in time practically or reasonably duplicate the two-way cable pipe that is being deployed by AT&T and other cable operators. EchoStar has tried to respond to consumer demands through its participation in the StarBand joint venture with Gilat, but this service is provided through a platform that is relatively cumbersome to consumers. EchoStar's next-generation broadband solution (which involves use of the Ka-band) is likewise significantly spectrum-constrained. As a result, in the current MVPD market, cable operators control the only truly broadband conduit to and from the home. With control over that conduit, cable operators will, in turn, be able to seamlessly package the cable programming that is also distributed by EchoStar with complementary truly broadband interactive products that only cable operators can provide. Open access would allow EchoStar to compete on a more even footing with the video/broadband bundles being offered by cable operators.

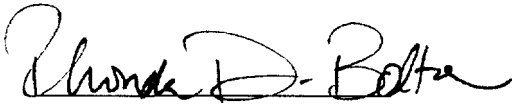
## **V. CONCLUSION**

In conclusion, while the Commission should not require open access unless a very rigorous standard is met, EchoStar believes that cable operators may well satisfy that standard. Additionally, if the Commission decides to impose open access requirements on cable operators, access should be available not only to unaffiliated Internet content providers, but also to distributors such as EchoStar that simply cannot reasonably duplicate the virtually limitless broadband capabilities of cable systems.

Respectfully submitted,

**EchoStar Satellite Corporation**

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*Counsel for EchoStar Satellite Corporation*

Dated: November 27, 2000

## CERTIFICATE OF SERVICE

The undersigned, Rhonda Rivens Bolton, hereby certifies that on November 27, 2000, a copy of the foregoing Comments was served via hand delivery upon the following:

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